85-1693

No. 85-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES; UNITED STATES SENATE; THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Speaker of the United States
House of Representatives, et al.

**Counsel of Record*

QUESTION PRESENTED

Whether it violates the principle of separation of powers for the Comptroller General, an independent officer of the United States appointed by the President for a statutory term of years by and with the advice and consent of the Senate, to perform the administrative tasks assigned to him by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, because a provision (now 31 U.S.C. 703(e)) of the Budget and Accounting Act of 1921 establishes a procedure for his removal for cause by an enactment in conformity with the Presentation Clause, particularly when that provision has never been used or tested and could be severed if necessary.

PARTIES IN THE DISTRICT COURT

The plaintiffs in Civil Action No. 86-0147, in addition to the American Postal Workers Union, were Sheridan A. Born, Julius Greenwald, and David A. Edmonson. The United States was the defendant. The Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General were intervenors. The individual House intervenors were Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court (App. 1a) is not reported. The order grants declaratory relief identical to the relief granted by the district court in *Charles A. Bowsher, Comptroller General of the United States* v. *Mike Synar, Member of Congress, et al.; United States Senate* v. *Mike Synar, Member of Congress, et al.;* and *Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, et al.* v. *Mike Synar, Member of Congress, et al.*, pending as Nos. 85-1377, 85-1378, 85-1379 in this Court ("*Synar*"). The opinion of the district court in *Synar* is reported at 626 F. Supp. 1374. The district court's order in *Synar* is reported at 626 F. Supp. 1404. The opinion and order are

also reprinted in the Joint Appendix filed here in those cases ("Synar J.A.") at 27–82.

JURISDICTION

The jurisdiction of the district court was based on section 274(a)(1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or the "Act"), Pub. L. No. 99–177, and the case below was heard and determined by a three-judge court pursuant to section 274(a)(5) of the Act, Synar J.A. 162–163. The district court entered its final order on March 17, 1986. The Comptroller General, the United States Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives filed a joint notice of appeal on March 20, 1986 in the district court. App. 2a.

This Court has jurisdiction under 28 U.S.C. 1252 because the order of the district court holds that provisions of an Act of Congress are unconstitutional. The jurisdiction of this Court is also founded on section 274(b) of the Act, Synar J.A. 163–164, which provides in part: "Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Appointments Clause, article II, section 2, clause 2 of the Constitution. Synar J.A. 92.

2. 31 U.S.C. 703(a)(1) and (e), Synar J.A. 101–02, which codify sections 302 and 303 of the Budget and Accounting Act of 1921, Pub. L. No. 13, ch. 18, 42 Stat. 20, 23–24. Synar J.A. 92, 94.

3. Part C of the Deficit Control Act, 99 Stat. 1063–93, 2 U.S.C. 901–907. Synar J.A. 109–61.

STATEMENT

An explanation of the administrative deficit reduction mechanism contained in the Deficit Control Act appears

at pages 2-4 of the jurisdictional statement filed in *United States Senate* v. *Mike Synar, Member of Congress, et al.*, No. 85-1378. On January 17, 1986 the American Postal Workers Union and three of its members brought an action for declaratory and injunctive relief alleging that the Act violates Article I, section 7 of the Constitution and the due process clause of the Fifth Amendment to the Constitution. The plaintiffs maintained that the Act unconstitutionally delegated Congress' lawmaking authority inconsistently with the requirements for enacting legislation and that the participation of the Directors of the Office of Management and Budget and the Congressional Budget Office and of the Comptroller General commingled legislative and executive powers in violation of the constitutional separation of powers. The complaint further alleged that one of the plaintiffs had been deprived of property without due process of law by the suspension of cost-of-living allowances for civil service annuitants. Finally, the complaint alleged injury on behalf of a class of members of the plaintiff union situated similarly to the individual plaintiff members.

After the district court denied plaintiffs' motion to consolidate their action with *Synar* v. *United States* and *National Treasury Employees Union* v. *United States*, which were then before that court, the plaintiffs moved for summary judgment on their delegation and separation of powers claims and voluntarily dismissed their due process cause of action and class action allegations. The United States, which had been named as the sole defendant, joined the plaintiffs in moving for summary judgment on the grounds that the Act violates the separation of powers. The Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General intervened to defend the Act.

Following its decision in *Synar* v. *United States*, the district court directed the parties to show cause why, in light of that decision, the plaintiffs' summary judgment motion should not be granted. On March 17 the court

granted "plaintiffs' request for declaratory relief identical to that granted by this court in [*Synar* v. *United States* and *National Treasury Employees Union* v. *United States*]." App. 1a.

THE QUESTION IS SUBSTANTIAL

This appeal presents the identical constitutional question presented by the *Synar* appeals, in which probable jurisdiction was noted on February 24, 1986, and which are scheduled for oral argument on April 23, 1986. That question is substantial for the reasons discussed in the jurisdictional statements filed in those three appeals.

CONCLUSION

Probable jurisdiction should be noted, except that this Court may choose to defer action on this jurisdictional statement pending its disposition of *Synar*, Nos. 85-1377, 85-1378, 85-1379. Appellee American Postal Workers Union is in fact participating in the *Synar* appeals as

amicus curiae and has filed a joint brief with The American Federation of Labor and Congress of Industrial Organizations and several other unions.

Respectfully submitted,

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Counsel for Appellants,
Thomas P. O'Neill, Jr.,
Speaker of the United States
House of Representatives, et al.

Dated: April 1986.

United States District Court

for the District of Columbia

Civil Action No. 86-0147

AMERICAN POSTAL WORKERS UNION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT,

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS

ORDER

Upon consideration of the pending dispositive motions filed by the parties in this case, the memoranda in support thereof and in opposition thereto, and the entire record herein, we find that plaintiffs have requested relief identical to that granted by this court to the plaintiffs in *Synar* v. *United States*, Civ. No. 85-3945 (Feb. 7, 1986), and *National Treasury Employees Union* v. *United States*, Civ. No. 85-4106 (Feb. 7, 1986), and that no good cause has been shown why summary judgment ought not be granted to plaintiffs. It is therefore by the court this seventeenth day of March, 1986,

ORDERED that plaintiffs' request for declaratory relief identical to that granted by this court in the abovementioned cases be and hereby is granted.

/s/ ANTONIN SCALIA,
Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit.

/s/ NORMA HOLLOWAY JOHNSON,
District Judge of the United States District Court for the District of Columbia.

/s/ OLIVER GASCH,
Senior District Judge of the United States District Court for the District of Columbia.

In the United States District Court

for the District of Columbia

Civil Action No. 86-0147

AMERICAN POSTAL WORKERS UNION, AFL-CIO, SHERIDAN A. BORN, JULIUS GREENWALD, AND DAVID A. EDMONSON, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT,

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS

JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that intervenors United States Senate, Speaker and Bipartisan Leadership Group of the United States House of Representatives, and Comptroller General of the United States hereby appeal to the Supreme Court of the United States from the final order entered in this case on March 17, 1986, granting the plaintiffs' request for declaratory relief identical to that granted by this Court in *Synar* v. *United States*, Civ. No. 85-3945 (Feb. 7, 1986), and *National Treasury Employees Union* v. *United States*, Civ. No. 85-4106 (Feb. 7, 1986).

This appeal is taken pursuant to 28 U.S.C. § 1252 and section 274(b) of the Balanced and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177.

Respectfully submitted,

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Dated: March 20, 1986.

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v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RESPONSE TO JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1693

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RESPONSE TO JURISDICTIONAL STATEMENT

As noted by appellants (J.S. 1, 4), the order of the United States District Court for the District of Columbia which has been appealed in this case grants declaratory relief identical to the relief granted by the Court in Bowsher v. Synar, et al.; United States Senate v. Synar, et al., and O'Neill v. Synar, et al., numbers 85-1377, 85-1378, 85-1379, in which oral argument was presented to the Court on April 23, 1986. Appellants in this case seek to present to the Court "the identical Constitutional question presented by the Synar appeals" (J.S. 4).

We agree with appellants that the District Court decided this case on the basis of its decision in Synar, and that it granted the identical declaratory relief in this case as in that. Accordingly, if the judgment below is affirmed in Synar, the judgment below in this case should be summarily affirmed. The same result should follow if this Court concludes that the judgment in Synar should be affirmed on some ground other than that on which the District Court based its decision. Contrary to appellants' submission, however, reversal of the District Court's judgment in Synar would not necessarily compel the conclusion that the present appellees did not state a valid claim that the automatic deficit reduction mechanism of the Gramm-Rudman Act is unconstitutional. Whereas the Synar litigation focuses exclusively on the role of the Comptroller General in that process, the present appellees raised a separate and distinct claim of unconstitutionality in their complaint below, viz. The present appellees alleged that the joint participation of the Directors of the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) under the Act unconstitutionally commingled legislative and executive powers in violation of the constitutional separation of powers. This constitutional issue is substantial and would not be resolved by a decision reversing the District Court's decision with respect to the role of the Comptroller General.

Accordingly, if the judgment in Synar is not affirmed, the Court should note probable jurisdiction of the present appeal and set the case for argument on the remaining issue -- the constitutionality of the joint participation of OMB and the CBO. Alternatively, the decision on the judgment of the District Court should be vacated for further proceedings in light of the Court's decision in Synar, which would leave the joint participation issue for the District Court's disposition in the first instance.

A separate certificate of service is enclosed.

Respectfully submitted,
Darryl J. Anderson
Counsel for Appellees

Dated: May 20, 1986

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v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES AS APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1693

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES AS APPELLEE

The three-judge district court in this case held unconstitutional the automatic deficit reduction process established by Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1063. In so holding, the court relied upon its prior decision in *Synar* v. *United States,* 626 F. Supp. 1374 (D.D.C. 1986), prob. juris. noted, Nos. 85-1377, 85-1378 and 85-1379 (Feb. 24, 1986). See J.S. App. 1a. The Court has jurisdiction of the appeal in the instant case under Section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, 99 Stat. 1098, and under 28 U.S.C. 1252. However, because the constitutional question presented in this case is identical to that presented in *Bowsher* v. *Synar,* No. 85-1377, and

related cases, which were argued before this Court on April 23, 1986, there is no occasion for plenary review in this case. Accordingly, it is respectfully submitted that the jurisdictional statement should be held and disposed of in light of the Court's decision in *Bowsher* v. *Synar,* No. 85-1377, and related cases.

CHARLES FRIED
Solicitor General

MAY 1986

DOJ-1986-05